In the Supreme Court of the United States

OCTOBER TERM, 1942

No. .....

KHARAITI RAM SAMRAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 24) is reported as "Kharaiti Ram Samras v. United States of America," in 125 Fed. (2nd) 879. The United States District Court did not file an opinion.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is February 13th, 1942 (R. 29). No petition for rehearing was filed.

2. The jurisdiction of this honorable Court is invoked under the provisions of Section (a) of the Judicial Code, as amended by the Act of February 15, 1925, 43 Statutes 938, Title 28 U. S. C. A., Section 347(a).

III.

STATEMENT OF THE CASE.

The statement of the matter involved set forth in the petition for writ of certiorari (supra pp. 2, 3, 4) is believed sufficient for a discussion of the assignment of errors presented and that statement is therefore adopted herein in the interest of brevity.

IV.

SPECIFICATION OF ERRORS.

1. That petitioner was denied due process of law because he was denied admission to citizenship to the United States solely on account of the fact that he was not a person of white color or a person of African nativity within the meaning of Section 2169 of the United States Revised Statutes.

2. That the Circuit Court of Appeals erred in holding that the power over naturalization, although *expressly* given to Congress by the Constitution, is similar to the exclusion and deportation of aliens, and regarding the latter, the power is *political,* and the exercise thereof cannot be challenged in the

courts; and no less reason exists for saying that the power over naturalization is *political* also.

3. That the Circuit Court of Appeals erred in holding that the provision in the Constitution empowering Congress to establish a "uniform rule of naturalization" relates to geographical uniformity only, and not to intrinsic uniformity.

4. That the Circuit Court of Appeals erred in holding that Section 2169 of the United States Revised Statutes was enacted in conformity to Article 1, Section 8, Clause 18, of the Constitution, and, therefore, was germane to the end to be accomplished.

5. That the Circuit Court of Appeals erred in holding that "liberty" mentioned in the Fifth Amendment to the United States Constitution was not involved in the instant case.

6. That the Circuit Court of Appeals erred in holding that the petitioner herein is not a free white person within the meaning of Section 2169 of the United States Revised Statutes, 8 U. S. C. A. Section 703 note, and in view of the decision of the United States Supreme Court in the case of *United States v. Bhagat Singh Thind,* 261 U. S. 204, 43 S. Ct. 338, 67 L. Ed. 616.

V.

ARGUMENT.

1. THE HONORABLE CIRCUIT COURT OF APPEALS HOLDS THAT THE POWER OVER NATURALIZATION, ALTHOUGH EXPRESSLY GIVEN TO CONGRESS BY THE CONSTITUTION, IS SIMILAR TO THE INHERENT POWER OF CONGRESS OVER THE EXCLUSION AND DEPORTATION OF ALIENS (NISHIMURA EKIU V. UNITED STATES, 142 U. S. 651, 659, 660), AND REGARDING THE LATTER, THE POWER IS POLITICAL, AND THE EXERCISE THEREOF CANNOT BE CHALLENGED IN THE COURTS; AND NO LESS REASON EXISTS FOR SAYING THAT THE POWER OVER NATURALIZATION IS POLITICAL ALSO.

We totally disagree with this contention in so far as naturalization is concerned. The exclusion and deportation of aliens involves an *external* or sovereign (political) power. The doctrine of political questions in the Federal Courts involves *external* problems such as the negotiation, violations and termination of treaties; the beginning and ending of war; the admission and deportation of aliens; the jurisdiction over territory; the recognition of States, Government, War and Measures Short of War; the status of Indian Tribes, and the guaranty of a republican form of government. See, in this connection, "Political Questions," 38 Harvard Law Review, 296; "The Doctrine of Political Questions in the Federal Courts," 8 Minnesota Law Review, 485.

Some expressions are to be found in the decisions relating to naturalization cases to the effect that the naturalization power asserted is inherent in sovereignty. These expressions are *obiter dictum,* and, no

doubt, resulted from confusing naturalization with the *exclusion or expulsion* of aliens. It is probably true with regard to the *exclusion* of aliens that the power asserted is inherent in sovereignty because it relates to an *external* as distinguished from an *internal* governmental affair (*The Chinese Exclusion Case,* 130 U. S. 581, 604, 606). There are two propositions affecting and distinguishing resident aliens lawfully within the United States and aliens seeking admission to the United States, namely: First, that the alien persons are persons lawfully residing and domiciled in the United States for permanent residence—they may qualify as to the required five year continual residence required as a condition precedent to naturalization; secondly, that as such they are within the protection of the Federal Constitution, *and secured by its guarantees against arbitrary and capricious laws enacted by Congress* masquerading as being within a power granted, i. e., such aliens are guaranteed *substantive* due process of law, whereas aliens seeking admission are only guaranteed *procedural* due process.

That those aliens who have become *domiciled* in a country are entitled to more distinct and larger measure of protection than those who are simply seeking admission, passing through, or temporarily within it, or, perhaps, unlawfully within it, has long been recognized by the law of nations. It was said by the United States Supreme Court in the early case of *The Venus,* 8 Cranch (U. S.) 253, 278:

> "The writers upon the law of nations distinguish between temporary residence in a foreign

country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicile,* which he defines to be 'a habitation fixed in any place, with an intention of always staying there'. Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizen; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicile, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. (Vatt. pp. 92, 93.) Grotius nowhere uses the word *domicile,* but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause. The former he denominates strangers, and the latter subjects. The rule is thus laid down by Sir Robert Phillimore: 'It has been said that these rules of law are applicable to naturalized as well as native citizens. But there is a class of persons which cannot be, strictly speaking, included under either of these denominations, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode . . . in another. These are domiciled inhabitants: they have not put on a new citizenship through some formal mode enjoined by the law of the new country. They are *de facto* though not *de jure* citizens of the country of their domicile.' 1 Phillimore, International Law, Chap. XVIII, p. 347."

In the *Koszeta* case it was said by Secretary Marcy:

> "This right to protect persons having a domicile, though not native-born or naturalized, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws . . .; his property is in the same way and to the same extent as theirs liable to contribute to the support of the government . . . In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable."
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> 2 *Wharton International Law Digest,* Section 198.

And in the case of *Lau Ow Bew v. United States,* 144 U. S. 47, 61, the Supreme Court declared that

> "by general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicile, . . . is to be presumed."

Indeed, there is considerable force in the contention that these alien persons are "denizens" within the true meaning and spirit of that word as used in the

common law. The old definition was given in the case of *Craw v. Ramsey,* Vaughan's Reports, at page 278, as follows:

> "A denizen of England by letters patent for life, in tayl or in fee, whereby he becomes a subject in regard of his property."

Blackstone, in Volume 1 of his Commentaries, at page 374, defines the word "denizen", as follows:

> "A denizen is an alien born, but who has obtained ex donatione regis letters patent to make him an English subject, . . . A denizen is a kind of middle state, between an alien and a natural-born subject, and partakes of both of them."

But whatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments. It has been repeated so often as to become axiomatic, that this government is one of enumerated and delegated powers, and, as declared in Article 10 of the amendments, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Whatever may be true as to *exclusion* or *expulsion,* there is a wide difference as to resident aliens. What, it may be asked, is the reason for any difference? The answer is quite obvious. The Constitution has no extra-territorial effect, and those who have not come lawfully within the confines of the United States

cannot claim any protection from its provisions. And it may be said that the national government, having full control of all matters relating to other nations (external affairs), has the power to build, as it were, a Chinese wall around our borders or frontiers and absolutely forbid aliens to *enter*. But the Constitution has potency everywhere *within the limits* of our territory, and the powers which the national government may exercise within such limits are those, and only those, given it by that instrument.

The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty. There is a great deal of confusion in the use of the word "sovereignty" by law writers. Sovereignty or supreme power is in this country vested in the *people,* and only in the *people.* By them certain sovereign powers have been delegated to the government of the United States and other sovereign powers reserved to the States or to themselves. This is not a matter of inference and argument, but it is the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the General Government. That amendment declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." When, therefore, power is exercised by Congress, authority for it must be found in the express terms in the

Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.

If a *foreign, external* or "sovereign" affair is involved, an altogether different situation is presented. It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of *foreign* or *external* affairs. That these are *fundamental,* may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our *internal* or *domestic* affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of the legislative powers *then possessed* by the States such portions as it was thought desirable to vest in the Federal Government, leaving those not included in the enumeration still in the States (*Carter v. Carter Coal Co.,* 298 U. S. 238, 294). That this doctrine applies only to powers which the States had, is self-evident. And since the States *severally* never possessed *international* powers, such powers could not have been carved from the mass of State powers but obviously were transmitted to the United States *from some other source.* During the *Colonial*

period, those powers were possessed *exclusively* by and were entirely under the control of the *Crown*. By the Declaration of Independence, "the Representatives of the United States of America" declared the United (not the several) Colonies to be free and independent States, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the Colonies *acting as a unit*, the powers of *external* sovereignty passed from the Crown not to the Colonies *severally*, but to the Colonies *in their collective and corporate capacity as the United States of America*. Even before the Declaration of Independence, the Colonies were a *unit* in *foreign affairs*, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen Colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but *sovereignty* survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the *external* sovereignty of Great Britain in respect of the Colonies ceased, it immediately passed to the *Union*. See *Penhallow v. Doane*, 3 Dall. (U. S.) 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between

his Britannic Majesty and the *"United States of America"* (8 Statutes—European Treaties—80).

The Union existed *before* the Constitution, which was ordained and established among other things to form "a more *perfect* Union." Prior to that time, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of *external* sovereignty and in the Union it remained without change save in so far as the Constitution in express terms *qualified its exercise.* The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the States were several their people in respect of *foreign affairs* were *one.*

It follows that the investment of the Federal Government with the powers of *external* or *foreign* sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereign powers, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co. v. United Fruit Co.,* 213 U. S. 347, 356); and operations of the Nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the

United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (*Jones v. United States,* 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting v. United States,* 149 U. S. 698, 705 et seq.), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co. v. United States,* 224 U. S. 583, 600-6; *Crandall, Treaties, Their Making and Enforcement,* 2d Ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the concept of nationality. This the court recognized and in each of the cases cited found the warrant for its conclusion not in the provisions of the Constitution, but in the law of nations.

In the case of *Burnet v. Brooks,* 288 U. S. 378, 396, the Supreme Court said:

> "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of *international* relations." (Italics supplied.)

Not only, as we have shown, is the Federal power over *external* or *international* affairs in origin and essential character different from that over *internal* affairs, but participation in the exercise of the power is significantly limited. In this vast *external* realm, with its important, complicated, delicate and mani-

fold problems, the President alone has the power to speak or listen as a representative of the Nation. He is the sole organ of the Federal Government in the field of *international* or *external* relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

The marked difference between foreign affairs and domestic, or internal, affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department, except the State Department, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

2. SECTION 2169 OF THE UNITED STATES REVISED STATUTES WAS AND IS UNCONSTITUTIONAL BECAUSE IT IS SO MANIFESTLY AND GROSSLY UNREASONABLE, IRRATIONAL, ILLOGICAL, ARBITRARY AND CAPRICIOUS UPON ITS FACE BECAUSE OF ITS DISCRIMINATORY CLASSIFICATION SOLELY BECAUSE OF RACE OR COLOR AS TO CONSTITUTE A VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BEYOND A REASONABLE DOUBT.

Section 2169 of the United States Revised Statutes (U. S. C. A., title 8, sec. 359), of February 18, 1875, and which was in full force and effect when appellant's petition for naturalization was filed, heard and determined, provides as follows:

> "The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

Appellant insists that Section 2169 of the Revised Statutes, because of its racial or color discrimination, is manifestly and grossly unreasonable, unjust, capricious and arbitrary, and that the designation of the class or classes to be excluded from the right or so-called privilege to naturalization as a citizen of the United States is not based upon a real or logical distinction. Appellant therefore contends that said Act of Congress is unconstitutional, beyond a reasonable doubt, and upon its face, as being in irreconcilable conflict with the inhibitions contained in the "due process of law" clause of the Fifth Amendment to the Constitution of the United States, inasmuch as

said Act of Congress, upon its face, makes a racial or color distinction or discrimination upon which there is no state of facts which can rationally support the discrimination.

In view of recent pronouncements of the United States Supreme Court, Congress has no more authority to enact legislation which is manifestly arbitrary, unreasonable and capricious under the "due process of law" clause of the Fifth Amendment to the Constitution than a State has authority to enact similar legislation under the due process of law clause of the Fourteenth Amendment to the Constitution. In the recent case of *Louisville Land Bank v. Radford,* 295 U. S. 555, the United States Supreme Court declared the so-called "Frazier-Lemke Bankruptcy Law" unconstitutional on the ground, among others, that it was *arbitrary* and *capricious.* Mr. Justice Brandeis, in delivering the opinion of the Supreme Court, stated, on page 589:

> "The *bankruptcy* power, *like the other great substantive powers of Congress,* is subject to the *Fifth Amendment.*" (Italics supplied.)

In the case of *Railroad Retirement Board v. Alton R. Co.,* 295 U. S. 330, the United States Supreme Court invalidated the Act of Congress establishing the so-called "Railway Employee's Pension Law" as being unconstitutional under the "due process of law" clause of the Fifth Amendment beause it was, among other reasons, *arbitrary* and *capricious.* Mr. Justice Roberts, who delivered the opinion of the

Supreme Court, said, among other things, 295 U. S., at pages 346 and 347:

> "The Federal Government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people. The Constitution is not a statute, but the supreme law of the land to which all statutes must conform, and the powers conferred upon the Federal Government are to be reasonably and fairly construed, with a view to effecting their purpose. But recognition of this principle can not justify attempted exercise of a power clearly beyond the true purpose of the grant. All agree that the pertinent provision of the Constitution is Article 1, Sec. 8, Clause 3, which confers power on the Congress 'To regulate Commerce . . . among the several States . . .'; *and that power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.*" (Italics supplied.)

Furthermore, and apparently for the purpose of removing any or all doubt in regard thereto, Mr. Justice Roberts used the following language in the margin of said opinion on pages 347 and 348:

> "When the question is whether the congress has properly exercised a granted power the inquiry is whether the means adopted bear any reasonable relation to the ostensible exertion of the power. Mungler v. Kansas, 123 U. S. 623, 661; Hammer v. Dagenhart, 247 U. S. 251, 276; Bailey v. Drexel Furniture Co., 259 U. S. 20, 37. When the question is whether *legislative* action

> transcends the limits of *due process guaranteed by the Fifth Amendment,* decision is guided by the *principle* that the law shall not be *unreasonable, arbitrary* or *capricious,* and that the means selected shall have a real and substantial relation to the object sought to be attained. Nebbia v. New York, 291 U. S. 502, 525." (Italics supplied.)

It will be noted that Congress was granted the *power, which it would not otherwise have,* to enact uniform laws on the subject of bankruptcies by Article 1, Section 8, Clause 4, of the United States Constitution. Clause 4 reads as follows:

> "The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and Uniform Laws on the subject of Bankruptcies throughout the United States."

Clause 4 is a single compound sentence. It contains a grant of power to Congress to enact uniform legislation on the subject of naturalization and the subject of bankruptcies. Even as early as 1902 the Supreme Court held that the Constitution, in its specific grant of power to Congress to enact laws regarding bankruptcy, did not intend that Congress should have untrammeled power, i. e., power to enact a *grossly unreasonable* law regarding bankruptcies masquerading as a law within the contemplated power granted. This was demonstrated by the decision of the United States Supreme Court in the case of *Hanover Nat. Bank v. Moyses,* 186 U. S. 181, at page 192. Chief Justice Fuller there said, in part:

> "Congress may prescribe any regulation concerning discharge in bankruptcy that are *not so grossly unreasonable* as to be incompatible with *fundamental law, . . .*" (Italics supplied.)

In the case of *Continental Bank v. Rock Island Ry. Co.,* 294 U. S. 648, at page 669, the Supreme Court said with reference to the bankruptcy power:

> "But, while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, *it does not follow that the power has no limitations.*" (Italics supplied.)

Inasmuch as the *Louisville Land Bank v. Radford* case, supra, holds that the bankruptcy power is subject to the Fifth Amendment to the Constitution, it necessarily follows that the naturalization power is likewise subject to the Fifth Amendment. The statement made by the Supreme Court in the *Louisville Land Bank* case, supra, was made with reference to a subject contained in the *very same sentence* with the subject of naturalization. Of course, in view of this fact, the same reasoning should apply to the subject of naturalization. It is well settled that the Fifth Amendment *qualifies* and *conditions,* in so far as it is applicable, *all* the provisions of the Constitution of the United States. (*McCray v. United States,* 195 U. S. 61; *Billings v. United States,* 232 U. S. 261; *United States v. Bennett,* 232 U. S. 299; *Flint v. Stone-Tracy Co.,* 220 U. S. 107; *Knowlton v. Moore,*

178 U. S. 41.) For instance, the United States Supreme Court has held that the Fifth Amendment, when applicable, qualifies and conditions the bankruptcy power (*Louisville Joint Stock Land Bank v. Radford,* supra); the war power (*Ex parte Milligan,* 4 Wall. (U. S.) 119); the power to regulate commerce (*United States v. Cress,* 243 U. S. 316, 326); the power to tax (*Heiner v. Donnan,* 285 U. S. 312, 326); the power to exclude aliens (*Wong Wing v. United States,* 163 U. S. 228); the patent power (*Bloomer v. McQuewan,* 55 U. S. 539, 14 L. ed. 532); and the power to borrow money on the credit of the United States (*Perry v. United States,* 294 U. S. 330).

Inasmuch as it must be conceded that the Congress cannot validly enact a manifestly *unreasonable, arbitrary* or *capricious* law, the sole question for solution on this branch of appellant's contention on the instant appeal is whether Section 2169 of the United States Revised Statutes is obnoxious to, and infringes upon, the due process of law clause of the Fifth Amendment because of its being manifestly and grossly *unreasonable, arbitrary* and *capricious,* in that it grants the right or so-called privilege to natives of Africa and aliens of African descent, who are otherwise qualified, and residing in the United States for permanent residence, while withholding the right or privilege from Hindus, natives of India. If any argument be required to demonstrate the manifest and grossly arbitrariness, unfairness and capriciousness of Section 2169 of the United States Revised

Statutes, it can be found in the language used by United States Circuit Judge Deady of Oregon in his opinion handed down sixty-one years ago in the case of *In re Camille,* 6 Fed. 256. In this case, decided in the United States Circuit Court for the District of Oregon, Judge Deady said, 6 Fed., at page 257:

> "From the first our naturalization laws only applied to the people who had settled the country —Europeans or white race—and so they remained until in 1870, (16 Stat. 256; Sec. 2169 Rev. St.) when, under the pro-negro feeling, generated and inflamed by the war with the southern states, and its political consequences, congress was driven at once to the other extreme, and opened the door, not only to persons of African descent, but to all those 'of African nativity'—thereby proffering the boon of American citizenship to the comparatively *savage* and *strange* inhabitants of the 'dark continent,' while withholding it from the intermediate and *much-better-qualified* red and yellow races." (Italics supplied.)

It is very apparent from the learned Circuit Judge's language delivered in this case, in the year of 1880, that he realized that there was something radically wrong with Section 2169. But, it should be remembered that no constitutional objection to Section 2169 was raised or urged in this case, *or any other case* thus far. The reason this was not done was, perhaps, because in 1880 the concept and content of "due process of law" had not been sufficiently developed upon the *substantive* side. The vague and general phrase "due process of law" is not defined by

the Constitution of the United States, consequently the Supreme Court has been compelled to develop its concept and content—to say what it means (*Davidson v. New Orleans,* 96 U. S. 97). In the course of so doing they have expanded it beyond its literal meaning of "due procedure" and have brought within it *substantive* as well as procedural rights (*Whitney v. California,* 274 U. S. 357, 373; *Wright v. United States,* 302 U. S. 583, 82 L. ed. 429). When applied to *substantive* rights it is now interpreted to mean that the Government is without right to deprive a person of life, liberty, or property by an act that has no *reasonable relation* to any proper Governmental purpose, or which is so far beyond the *necessity of the case* as to be an *arbitrary* exercise of Governmental power (*Nebbia v. New York,* 291 U. S. 502; *West Coast Hotel Co. v. Parrish,* 302 U. S. 379; *Green v. Franzier,* 253 U. S. 233; *House v. Mayes,* 219 U. S. 270; *Jones v. Portland,* 245 U. S. 217).

Furthermore, in the very recent case of *Alston v. School Board of City of Norfolk,* 112 Fed. (2d) 992, 130 A. L. R. 1512, certiorari denied by Supreme Court, the United States Circuit Court of Appeals for the Fourth Circuit declared a statute of the State of Virginia providing for larger salaries to white school teachers than the salaries of negro school teachers unconstitutional under the "due process of law" clause of the Fourteenth Amendment to the Federal Constitution. Among other things, the Court used the following language:

> "This is as clear a discrimination on the ground of race as could well be imagined and falls squarely within the inhibition of *both the due process and* the equal protection clauses of the 14th Amendment." (Italics supplied.)

Therefore, if the "due process" clause of the Fifth Amendment to the Constitution has the same meaning as the "due process" clause of the Fourteenth Amendment to the same Organic instrument, then an Act of Congress, such as Section 2169 (U. S. C. A., title 8, sec. 359), discriminating against persons, aliens or citizens, solely on account of race or color, would necessarily be unconstitutional upon its face *as a matter of law,* i. e., *per se.* The question now presented is whether the restraint imposed upon legislation by the due process clauses of the two amendments is identical. The Supreme Court has repeatedly, uniformly, definitely, and explicitly, held that the phrase "due process of law" contained in the Fifth Amendment to the Constitution has the same meaning as the similar phrase contained in the Fourteenth Amendment.

By the simplest and plainest rules of construction, the words "due process of law" must have the same meaning in the Fifth and the Fourteenth Amendments. This has been so stated in *Hurtado v. California,* 110 U. S. 56, 28 L. ed. 232. There the Court, after comparing the two amendments, said:

> "The natural and obvious inference is that in the sense of the Constitution, 'due process of

> law' was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, *it was used in the same sense and with no greater extent.*" (Italics supplied.)

The United States Supreme Court has repeatedly been called upon to decide whether certain classifications in state statutes were reasonable or arbitrary, and whether they were in conflict with the due process of law clause of the Fourteenth Amendment.

McGee on Due Process of Law, p. 60, says:

> "Purely arbitrary decress or enactments of the Legislature directed against individuals or classes are held not to be 'the law of the land,' or to conform to 'due process of law.' "

And *Willoughby on the Constitution*, pp. 873, 874, says:

> "The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a Legislature directed against particular individuals or corporations, or classes of such,

> without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike,' and do not subject the individual to an arbitrary exercise of the powers of government."

Hence we conclude that an arbitrary clasification by Congress is repugnant to the "due process" clause of the Fifth Amendment. The power to make an arbitrary classification is arbitrary, and arbitrary power has no place in our system of government. Ours is a government of law, and not of men.

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3. **SECTION 2169 OF THE UNITED STATES REVISED STATUTES WAS AND IS UNCONSTITUTIONAL AND VOID BECAUSE IT IS IN IRRECONCILABLE CONFLICT WITH ARTICLE 1, SECTION 8, CLAUSE 4, OF THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT IT VIOLATES SAID ARTICLE, SECTION AND CLAUSE INASMUCH AS IT IS NOT INTRINSICALLY UNIFORM IN ITS OPERATION, BUT IS ONLY GEOGRAPHICALLY UNIFORM.**

Appellant contends that Section 2169 of the United States Revised Statutes is unconstitutional for the reason that it violates Article 1, Section 8, Clause 4, of the Constitution of the United States, which reads as follows:

> "The Congress shall have power . . . To establish an uniform Rule of Naturalization, and

> uniform Laws on the subject of Bankruptcies throughout the United States."

We are firmly convinced that the requirement of uniformity which the Constitution imposes upon Congress on the subject of naturalization is an *intrinsic, inherent* and *personal* uniformity, and not merely a *geographical* uniformity, i. e., a territorial uniformity "throughout the United States," such as appertains to bankruptcies and customs duties. It is observable that a *comma* appears immediately after the word "Naturalization," and, therefore, the phrase "throughout the United States" does not qualify the preceding phrase "uniform Rule of Naturalization" (rule of last antecedent). If this be conceded, it is quite obvious that the Constitutional requirement of uniformity relates to an inherent, intrinsic and personal uniformity, in the sense of being alike applicable to all alien members of the community, and not merely geographical uniformity. The phrase "throughout the United States" refers, under the rule of the last antecedent, to the word "uniform". The emphasis is on the words "uniform" and "throughout", and their correlation leaves no doubt that the uniformity requirement in the case of *bankruptcies* is geographical or territorial and not personal, in the sense of being alike applicable to all members of the community. If the word "uniform" in this section of the Constitution has an intrinsic or inherent rather than a geographical or territorial meaning, then it is equivalent to the phrase "equal protection of the laws" con-

tained in the Fourteenth Amendment, the *minimum* requirement of which must be read into the "due process of law" clause of the Fifth Amendment to the Constitution of the United States (*Traux v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 A. L. R. 375).

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4. SECTION 2169 OF THE UNITED STATES REVISED STATUTES WAS AND IS UNCONSTITUTIONAL AND VOID BECAUSE OF ITS BEING IN CONFLICT WITH ARTICLE 1, SECTION 8, CLAUSE 18, OF THE CONSTITUTION OF THE UNITED STATES, INASMUCH AS SAID SECTION 2169, AND ITS DISCRIMINATION OR CLASSIFICATION REGARDING RACE OR COLOR, WAS AND IS NOT NECESSARY OR PROPER FOR CARRYING INTO EXECUTION THE NATURALIZATION POWER DELEGATED AND CONFERRED BY THE CONSTITUTION OF THE UNITED STATES BY ARTICLE 1, SECTION 8, CLAUSE 4, OF THE CONSTITUTION OF THE UNITED STATES; I. E., RACIAL OR COLOR DISCRIMINATION NOT GERMANE TO THE SUBJECT OF NATURALIZATION.

Appellant further contends that Section 2169 of the United States Revised Statutes is unconstitutional for the reason that it violates Article 1, Section 8, Clause 18, (co-efficient clause) of the Constitution of the United States, and which reads as follows:

> "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The claimed violation of the Federal Constitution in this connection has to do with the asserted fact that said Section 2169 was and is not *necessary* or *proper* for carrying into existence the naturalization power delegated to and vested in Congress, because of its discrimination or wrongful classification solely with regard to race or color, and not upon a material difference in the qualifications, education, abilities, experience, duties or moral character of the *individual* alien seeking naturalization.

Petitioner believes that the Honorable Circuit Court of Appeals was in error in holding and deciding that Section 169 of the Revised Statutes was enacted in conformity to Article 1, Section 8, Clause 18, of the Constitution.

They rely upon the *Legal Tender Cases,* 110 U. S. 421, 440, 4 S. Ct. 122, 125, 28 L. Ed. 204, wherein it was stated:

> "By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, *without which* the powers granted must fail of execution; but they include all *appropriate means* which are *conducive* or *adapted to the end to be accomplished, and* which, in the judgment of Congress, will most advantageously effect it." (Emphasis ours.)

The above quoted language clearly means that the enforcement legislation must be *appropriate,* i. e., *adapted* or *germane* to the end to be accomplished.

The enforcement legislation committed to the Congress must be *appropriate*. Certainly there is no philosophical relationship between racial descent or color and the capacity to enjoy political rights and capacity to vote. This thought is fully endorsed by the Fifteenth Amendment to the Constitution. By it neither the *United States* nor any state may deny to any citizen, native-born or *naturalized,* whether naturalized by the naturalization laws or by so-called "derivative" naturalization under Section 1993 of the United States Revised Statutes, a right to vote or to hold public office because of race or color. Furthermore, it should be remembered that the Constitution (Article 1, Section 2, Clause 2; Section 3, Clause 3) allows *naturalized* citizens, which has included since 1870 African negroes, to qualify for and become elected to the United States Senate and House of Representatives. The only exception now existing is the Presidency and Vice-Presidency. The United States Constitution even allows *unnaturalized* aliens to *bring* suits in the Federal courts and to *remove* suits from state courts against them into the Federal courts (Amendment XI), regardless of which is plaintiff. If race or color serves no basis for discrimination or distinction between citizens, native-born, naturalized aliens, or even aliens *not naturalized,* it affords none for keeping personally fit permanent alien residents in a status in which that illogical and whimsical distinction may be made against them. The foregoing is mentioned for the purpose of practically *demonstrating* that the incidental enforcement legis-

lation contained and embodied in Section 2169 has no reasonable relevancy to the object sought to be attained by the Congress on the subject of naturalization, namely, personal fitness for citizenship. Now, Clause 17, Article 1, Section 8, of the *original* Constitution, ordaining that Congress shall have power to enact all necessary *and* proper legislation to carry into effect the preceding great powers (which are not self-executing) delegated and granted to them, operates to restrain the Congress from executing manifestly any capricious legislation in an endeavor to enforce a provision of the Constitution which is not self-executing. This idea is brought home in more recent amendments to the Constitution which are not self-executing. Witness the Thirteenth Amendment, Section 2; Fourteenth Amendment, Section 5; Fifteenth Amendment, Section 2; Eighteenth Amendment, Section 2; all to the effect that the enforcement power must be by *"appropriate"* legislation. So, Clause 17 of the original Constitution is equally binding and mandatory as any other part of the Constitution. In so far as *reasonableness, propriety and necessity* is concerned, the same element is contained in the concept and content of the phrase "due process of law" of the Fifth and Fourteenth Amendments. Likewise with regard to Clause 17, Article 1, Section 8, i. e., the element of *necessity and propriety* ordained by this clause, *to this extent,* overlaps, and a violation of one may violate the other, because the spheres of protection they offer are the same or coterminous. We thus mean that a violation of one

would violate the other on the element of manifest unreasonableness, capriciousness and arbitrariness, namely, and, perhaps, more accurately speaking, the incidental enforcement legislation of Congress to put into operation this delegated power would be antagonistic to *two* parts of the Constitution. Race or color, unless the premises would be valid from an evidential standpoint, would constitute a solecism from the standpoint of formal logic.

The United States is a constitutional government, i. e., from the written constitutional standpoint. It has been determined by the Supreme Court time and time again that the Congress can exercise no *power* which has not been either expressly or impliedly delegated. Therefore, Congress would have no power to enact an "Uniform Rule of Naturalization" unless it had been delegated to them by the Constitution. In this instance it cannot be claimed that Congress has *implied* power to enact an uniform rule of naturalization. This contention would constitute a solecism because otherwise the alleged implied power would not be *expressed* in the Constitution as a granted and delegated power. We concede that naturalization is a privilege, and not a constitutional right, but to the following extent only, at its *election,* to establish "an uniform rule" on the subject of naturalization. Inasmuch as the power is elective or optional, and not compulsory or mandatory, the Congress has the power to withhold it (enforcement legislation) altogether, or entirely, without giving any reason therefor. But, once the Congress decides to act and the power is at-

tempted to be exercised (enforcement legislation), the legislation must be *necessary, proper, reasonable and appropriate.*

The bankruptcy power need not be exercised by the Congress. No person has a constitutional *right* to "go" through bankruptcy. It is a privilege and may be *withheld* by Congress entirely without their giving any reason whatsoever therefor. But, once it is attempted to be exercised, the Congressional legislation must be *apt, appropriate and reasonable.*

Likewise, with the patent power. That power need not be exercised by Congress. No person, citizen or alien, has the slightest constitutional *right* to secure a patent. It is a privilege to this extent: It may be entirely withheld by the Congress without reason for their *silence,* i. e., failure to enact enforcement legislation. Once it is exercised, or attempted to be exercised, however, their legislation must be *reasonable* and in accordance with other applicable sections of the Constitution.

Likewise regarding the power delegated to Congress to regulate commerce among the several states. It need not be exercised by the Congress. Congress may remain silent on the subject. No citizen, alien or corporation, a resident of a state, has the constitutional *right* to engage in *intrastate* commerce in another state. Apparently, in the case of the "silence" of Congress they could erect an insuperable barrier to intrastate commerce. But, on the other hand, once enforcement is attempted it must be in accordance with reason and due process of law.

Regarding the germaneness of the incidental legislation enacted by the Congress regarding the exercising of the power granted by Clause 17, of Article 1, Section 8, of the Constitution, it is well settled by the decisions of the United States Supreme Court that Congressional legislation enacted for the purpose of enforcing the great powers delegated to them, *must have a real and substantial relation to the object sought to be attained.* Therefore, in the instance of the exercise of the naturalization power, the question presented, under this heading, is whether or not Section 2169 of the United States Revised Statutes, with reference to its racial or color distinction, has an *apt, reasonable or logical* relation to the only legitimate object sought to be attained by the legislation; namely, good citizenship. The question really is, in the last analysis, do alien "negro" persons born on the continent of Africa, or those born, in other countries, of African descent, or "white" persons, who are aliens of other countries, though they need *not* be of "white" descent, which is accorded to African negroes, *of necessity,* i. e., *necessarily and properly,* make better citizens than aliens of other races or colors? Race or color is not germane to, and constitutes nothing whatsoever with, the subject of naturalization. Why? Any grammar school graduate can apprehend that because of the African feature introduced into the original naturalization law, *demonstrates,* beyond cavil, that race or color is not germane to good citizenship. If Africans (negroes and black aliens) are deemed qualified to become American

citizens by naturalization certainly the intermediate brown, yellow and red races are equally qualified. If Section 2169 of the United States Revised Statutes was confined solely to "white" aliens something might be said that the Congress considered and determined that race or color was an essential qualification to properly qualify an alien for naturalization as an American citizen. But, by including African and/or black aliens along with white aliens—placing them on a par with each other with respect to naturalization, the racial or colorization theory is completely exploded, and, we hope, for all time.

Finally, on this question of germaneness of race or color to naturalization we respectfully call the attention of this Honorable Court that under the decision of the United States Supreme Court handed down in the celebrated case of *Weedin v. Chin Bow,* 274 U. S. 657, which is commonly referred to as the "grandson" or "the third generation case", the United States Supreme Court declared, in a lengthy opinion, written by Chief Justice Taft, that the rights of *derivative* citizenship, *a form of naturalization,* under Section 1993 of the United States Revised Statutes, that the rights of American citizenship, *derivative naturalization,* descend to the "grandchildren" of native-born Chinese, provided that the fathers of such children born in China have been admitted to the United States previous to the birth of such children. Surely, if the *third* generation of aliens (Chinese), *whatever their race or color may be,* are not only eligible but *become* American citizens *at*

birth, race or color is not germane to citizenship and the Congress so thought when they enacted Section 1993 of the United States Revised Statutes.

Essentially the statutory requirements are the filing of the preliminary declaration of intention, residence for the required time, good moral character and that the Court shall be satisfied that the applicant is attached to the principles of the Constitution of the United States, and is well disposed to the good order and happiness of the same.

Such requirements for eligibility most aliens can acquire by exercision of their mental faculties and control of their behavior. We may well call the foregoing the personable attainable qualifications to distinguish them from race, origin, descent or color requirements. Why postpone the process of Americanization to the second generation, which in reality does not exist, as shall be presently shown (Section 1933 of the United States Revised Statutes). Race or color certainly is not germane to citizenship because the children of these citizens, by birth, *here* (later on it shall be shown does not exist) be citizens? Why postpone the process of Americanization to the second generation (later we shall show to the third generation)? Also, the Act of 1906 and its amendments and subsequent acts favored the white and *African* seamen and soldiers, to the exclusion of other aliens, *excepting Filipinos and Puerto Ricans* (so the decisions say), even though they were soldiers or seamen. This shows that service in the army or navy by an alien otherwise ineligible because of race or color

in reality is not germane to the subject of citizenship. The Act of 1922, the so-called "Cable Act", provides "that any woman citizen who marries an alien *ineligible to citizenship* shall cease to be a citizen." This is a clear racial discrimination. Furthermore, in the last section of the Cable Act it is provided: "No woman whose husband is *not eligible to citizenship* shall be naturalized during the continuance of the marital status."

5. THAT THE DECISION OF THE UNITED STATES SUPREME COURT RENDERED IN 1923 IN THE CASE OF UNITED STATES VS. BHAGET SINGH THIND, 261 U. S. 204, HOLDING THAT NATIVES OF INDIA (HINDUS) ARE NOT WHITE PERSONS SHOULD BE RECONSIDERED AND DEPARTED FROM AND OVERRULED.

Petitioner urges the further contention that if it were not for the decision of the United States Supreme Court delivered on February 19, 1923, in the case of *United States v. Bhaget Singh Thind,* 261 U. S. 204, he would be eligible to naturalization as a citizen of the United States. Prior to the rendition of this decision Hindus were, according to a majority of lower Federal court decisions, duly granted American citizenship under Section 2169 of the United States Revised Statutes, and Hindus were considered to be "white" persons ethnologically as well as legally. In 1923, however, Mr. Justice Sutherland, speaking for the United States Supreme Court, in interpreting the law, held that a high caste Hindu of full Indian blood was not a white person within the meaning of Section 2169 of the United States Revised Statutes.

This opinion was delivered in the case of a Hindu from the Punjab, India. He was granted a certificate of naturalization by the United States District Court for the District of Oregon, over the objection of the naturalization examiner for the United States. A bill in equity was then filed by the United States, seeking a cancellation of the certificate on the ground that the appellee was not a white person and therefore not lawfully entitled to naturalization. The United States District Court on motion dismissed the bill. An appeal was subsequently taken by the Government to the Ninth Circuit Court of Appeals, which tribunal, however, certified the case to the United States Supreme Court for a ruling on the points at issue.

In writing the opinion of the United States Supreme Court, Mr. Justice Sutherland presumably did a certain amount of research work in the field of ethnology to trace the racial antecedents of the Hindus. Unable to disprove or discredit the Caucasian or Aryan theory, he seems to admit by implication, though not in definite terms, that the Hindus are ethnologically "white". He states, however, that "mere ability on the part of the applicant for naturalization to establish a line of descent from a Caucasian ancestor will not *ipso facto* and necessarily conclude the inquiry." What his criterion of judgment in this case is he explains further: "The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."

Under this ruling Hindus lost their right to American citizenship, and with it they lost many of the privileges and facilities that contribute toward a measure of comfort and happiness in life.

With all due respect to the United States Supreme Court, we believe that this decision is wrong. We believe that with the present changed personnel of the United States Supreme Court it is entirely possible that they may reconsider their decision in the *Thind* case, supra, and depart therefrom and hold that natives of India (Hindus) are "white" persons within the spirit and meaning of Section 2169 of the Revised Statutes. In reviewing and analyzing the opinion delivered for the Supreme Court by the learned Mr. Justice Sutherland, one can find a few points of interest to which a legitimate exception may be taken. In the first place there is overwhelming strong, scientific evidence and abundant proof, that Hindus are ethnologically related to Caucasian Europeans. Almost all the recognized authorities on the subject, including H. C. Rawlinson, Isaac Taylor, E. B. Havel, W. Crooke, A. H. Keane, J. Deniker, A. C. Haddon, Herbert Risley, D. G. Brinton, Latham and Morris, agree that ethnologically speaking, Hindus are Caucasian, or Aryan, or "white", as the terms may signify.

On June 21, 1939, Father John Cooper of Catholic University, Washington, D. C., made a statement before the House Committee on Immigration and Naturalization that "the main races of the world are the

Mongoloid, the Negroid, and the Caucasoid, the last being the white race. All of our data seems to show conclusively that the Hindu people are members of the white race rather than either of the other. This is not one of the theoretic problems in the field; it is accepted as almost a first principle." Supporting this view, Dr. Harry L. Shapiro, Associate Curator, American Museum of Natural History, New York City, and Lecturer, Columbia University, states that "Hindus are generally classified by anthropologists as members of the Caucasion family. One might say universally now, except that in every field, every science that I am aware of, there are always one or two dissenters. . . . I would say the great majority of the reliable authorities so classify them."

In the second place the Honorable Justice refers to the common man, common speech, and popular understanding of the word "Caucasian". How he applied this test in the case has not been revealed in the opinion, and the decision seems to have been based only on his appraisal of the understanding of the common man. How it contrasts with the popular opinion on the subject is explained by a statement made on June 21, 1939, by Representative Poage of Texas, a member of the House Committee on Immigration and Naturalization:

> "I would like to make an observation, maybe a question, in connection with this Supreme Court decision. It strikes me, without any desire to criticize the court, that everybody who has gone to high school in the United States knows that

> the Indian people are Caucasian people. It was taught when I went to school and it was taught when the rest of you went to school, and while there is no law requiring Congressmen to have a high school education, I take it that most every member of Congress now, or at least in 1924, had approximately the equivalent of a high school education anyhow, and that the Congressmen who passed that law were perfectly familiar with the fact that the people of India were of the Caucasian race and were at least technically known as of the white race, and it seems to me that the Supreme Court certainly paid no compliment to the members of Congress when they assumed that Congress had in mind that race depended upon the amount of pigmentation in the skin only, and I have been given to understand that that is the basis of the difference in appearance between the Hindu and the man who went north from wherever their homeland was, that is, the man who went south and east stayed in a hotter climate and became of darker complexion, and those that moved up into the German forests and lived in the shade there for generations became fair-skinned. Is that right, Father (Cooper)?" Father Cooper: "That is about right; yes . . ."

In the third place, the question of color and assimilation has been brought into discussion by Justice Sutherland, although the law does not mention either color or assimilation. If, however, either one is applied as a standard for citizenship or naturalization, then Hindus can stand the test successfully side by side with the people of the Near East, southern Europeans, and Mexicans. If these peoples are entitled to

naturalization, there is no reason why Hindus should be denied it. In this instance, discrimination against Hindus is evidently capricious, and the opinion of the Supreme Court apparently erroneous.

In concluding this branch of the subject we invite the attention of this Honorable Court to the following language of Mr. Justice Sutherland in the case of *United States v. Bhaget Singh Thind*, supra:

> "It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from various groups of persons in this country commonly recognized as *white*. The *children* of English, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their *European* origin. On the other hand, it cannot be doubted that the *children* born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely *racial difference*, and it is of such character and extent that the great body of our people instinctively recognize it and rejects the thought of assimilation." (Italics supplied.)

It is transparently obvious from a reading of the immediately above quoted language that the learned Justice, and his associates who concurred in his opinion, were under the impression that Section 2169 of the United States Revised Statutes only applied to

aliens of *European* ancestry. He quite certainly did not have in mind when he penned this opinion that aliens of *African* ancestry (black persons) were equally eligible to naturalization along with aliens of European ancestry (white persons). If he did he instinctively would have known that the "great body of our people" recognize it (racial difference) and reject the thought of assimilation, namely, that natives of Africa or aliens of African descent (negroes) can not assimilate with persons of European ancestry (so-called white persons). Also, regarding the learned Justice's contention that the great body of our people instinctively rejects the thought of assimilation with members of the Hindu race, it should be borne in mind that the United States Census of 1940 discloses, so we are informed, that out of a Hindu population of less than four thousand about three hundred persons of Hindu ancestry were lawfully married to persons of European ancestry. This factual situation demonstrates that they do assimilate.

CONCLUSION

The respondent relied in the lower court strongly on the cases of *Ozawa v. United States*, 260 U. S. 179, and *United States v. Thind*, 261 U. S. 204, as having determined *all* of the issues raised by petitioner in the instant application. In this connection the Government stated, in its reply brief, at pages 2 and 3, as follows:

> ". . . It is the contention of appellee that all of the issues raised in the present appeal were determined adversely to this appellant by the Supreme Court in the Ozawa Case and the Thind Case, which, it is respectfully submitted, are binding on this Court."

With all due respect for the learned counsel for the Government, who penned its reply brief, we take issue with this statement and contend that none of the constitutional points urged by the petitioner herein (appellant therein) were determined in either of the referred to cases. Appellee also states on page 3 of the reply brief with reference to the case of *Ozawa v. United States,* supra, as follows:

> ". . . The effect of the Fifth Amendment, Sixth Amendment and Fourteenth Amendment to the Constitution was argued on behalf of that appellant. (260 U. S. at 184.) It is not accurate, as counsel for appellant contends, that the constitutionality of Section 2169 was not determined by the Ozawa Case."

Turning to page 184 of Volume 260 of the United States Supreme Court Reports, we find that Mr. George W. Wickersham, former United States Attorney General, who represented the appellant in the Supreme Court, used the following language:

> ". . . The provisions of the Fourteenth Amendment in reference to persons 'are universal in the application to all persons within the territorial jurisdiction without regard to any difference of race, or color, or nationality.' Yick Wo v. Hop-

> kins, 118 U. S. 369. The same rule has been applied to include aliens under the Fifth and Sixth Amendments. Wong Wing v. United States, 163 U. S. 235."

It will be noted from the immediately above quoted language of Mr. Wickersham that it is not claimed what particular "clause" of the Fifth Amendment was relied upon. The Fifth Amendment contains five clauses. Likewise, the quoted language fails to disclose which of the five clauses contained in the Sixth Amendment was relied upon. Similarly, we are not enlightened by the quoted language which of the four clauses contained in Section 1 of the Fourteenth Amendment was referred to. Mr. Wickersham states not a single word in his entire argument to the effect that Section 2169 of the United States Revised Statutes is *unconstitutional for any reason.* Furthermore, the Supreme Court in their opinion delivered in the *Ozawa* case did not mention one word regarding the constitutionality of Section 2169, nor did they even mention the Fifth, Sixth or Fourteenth Amendments. Besides, the well settled rule of *stare decisis* holds that a decision is not even authority, except upon the point actually *passed upon* by the court in its opinion and *directly involved* in the case. This rule, for that matter, is not even involved in the *Ozawa* case, because the decision does not, directly or indirectly (obiter dictum), state that Section 2169 is constitutional, nor does it even mention the United States Constitution. It is not accurate, as counsel for appellee in the Court of Appeals contended, that the

constitutionality of Section 2169 was determined by the *Ozawa* case. We insist that the only points decided in this case were that Section 2169 of the United States Revised Statutes is consistent with the Naturalization Act of June 29, 1906, and was not impliedly repealed by it; and, secondly, that aliens of the Japanese race are not Caucasians, or white persons, within the meaning and scope of Section 2169.

The case of *United States v. Thind*, supra, so much relied upon by appellee in the Court of Appeals, only determined one question, which was the sole and only point urged by the appellee, namely, that alien Hindus, although a branch of the Caucasian race ethnologically speaking, were not white persons within the meaning and intent of Section 2169. This decision is only authority on this sole question. The *constitutionality* of Section 2169 was not *raised, decided,* or *mentioned.*

Appellee in the Court of Appeals cited and quoted from the decision rendered in the case of *United States v. Macintosh,* 283 U. S. 605, 615, 51 S. Ct. 570, 75 L. Ed. 1302, as sustaining its position. This case holds that naturalization is a privilege, to be given, qualified or withheld as Congress may determine. No question whatever was advanced or determined in this case that Section 2169 of the Revised Statutes was constitutional.

The case of *United States v. Ginsberg,* 243 U. S. 472, was next cited, and quoted from, as favoring the contention of the Government. This case is not author-

ity for the constitutional validity of Section 2169 because no question of this nature was raised or decided. This case is only authority to the effect that no alien has the slightest "right" to naturalization unless all statutory requirements are complied with.

Next cited, and quoted from, is *Maney v. United States,* 278 U. S. 17, as supporting appellee's position in the Court of Appeals. The Supreme Court there enunciated that naturalization is in the nature of a privilege, grant or Government gift, and that naturalization proceedings for admission to citizenship are judicial, they are not for the usual purpose of vindicating an existing "right" but for the purpose of getting granted to an alien "rights" that do not yet exist. Absolutely nothing was there determined or said regarding the constitutionality of Section 2169.

Immediately succeeding, appellee in the Court of Appeals quoted a sentence from the opinion of the Supreme Court handed down in the case of *United States v. Schwimmer,* 279 U. S. 644, as having relevancy to the instant appeal in the Court of Appeals. No question respecting the constitutionality of Section 2169 was involved or determined in this case. The case is authority for the position that aliens have no natural "right" to become citizens, but only that "right" which is by statute conferred upon them.

The case of *Warkentin v. Schlotfeldt,* 93 Fed. (2d) 42, decided by the Circuit Court of Appeals, for the Seventh Circuit, was cited as constituting an authority for appellee. This case holds that the nation, as an inherent part of its sovereignity, is clothed with power

to prescribe who may be admitted to citizenship and under what condition that admission may be allowed. No authority is cited by the Court of Appeals sustaining the declaration that "naturalization is an inherent part of the sovereign power of the United States." The United States Supreme Court has never held, so far as we are aware, that naturalization is a matter of national sovereignity. We believe this theory to be entirely wrong. However, nothing whatever was or is decided or even mentioned in this case regarding the constitutionality of Section 2169 of the United States Revised Statutes.

Appellee next contended in its brief before the Court of Appeals that the Supreme Court had held that "the classification in the naturalization statute does not violate either the due process clause or the equal protection clause of the Fourteenth Amendment," and cites and quotes from the case of *Terrace v. Thompson,* 263 U. S. 197, as sustaining this contention, and appellee further stated, in this connection, that the Supreme Court, in this case, considered the Alien Land Law of the State of Washington, which, so appellee said, prohibited ownership of land by aliens *ineligible* to citizenship. The statute of the State of Washington disqualifies *all aliens* from owning land "other than those who in good faith have declared their intention to become citizens of the United States," *regardless of race or color.* It obviously operates against alien whites or negroes, under 18 years of age, or non-residents, as well as against the red, brown and yellow races. The statute clearly *does not* attempt to split ineligibles into two classes

on a racial distinction. The Supreme Court held in this case, and nothing more, that state legislation withholding the right to own land in the state from *all* aliens who have not in good faith declared their intention to become citizens of the United States, does not transgress the due process or equal protection clauses of the Fourteenth Amendment as applied to those aliens who, under the naturalization laws of Congress (Sec. 2169), are ineligible to citizenship, or as applied to citizens who desire to lease their lands to such aliens. The constitutionality of Section 2169 was not attacked in the *Terrace* case or determined therein. The Fifth Amendment is not even mentioned in the opinion. Nothing to the contrary appearing, the Supreme Court naturally *assumed* for the purpose of the decision that the act of Congress defining eligibility was or is not arbitrary or unreasonable. It was simply *supposition* with regard to this matter. In truth and in fact the opinion of the Supreme Court *demonstrates* that this language was *obiter dictum*. The following discussion appears with reference to eligibility to citizenship:

> ". . . Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be *supposed* that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy." (Italics supplied.)

Webb v. O'Brien, 263 U. S. 313, which case involved the validity of the Alien Land Law of California, is

next cited by appellee as authority. The constitutionality of Section 2169 was not involved in nor determined by this case. The Alien Land Law of California was upheld as being constitutional in this case, in part. The Supreme Court decided that a cropping contract between an owner of land in California and a Japanese alien, which, though it may not amount to a lease or a transfer of an interest in real property, is more than a contract of employment in that it gives the alien a right to use, and have a share in the benefit of, the land for agricultural purposes, exceeds the privileges granted to such aliens by Article 1 of the treaty of February 21, 1911, 37 Stat. 1504, between the United States and the Imperial Government of Japan, and is forbidden by the California Alien Land Law, which denies to aliens ineligible to citizenship permission to have and enjoy any privilege, not prescribed in the treaty, in respect to the use or the benefit of land for agricultural purposes.

The case of *City of Minneapolis v. Reum,* 56 Fed. 576, was cited and relied upon by appellee. The decision, decided by the Eighth Circuit Court of Appeals on May 29, 1893, simply holds that an alien was not entitled to naturalization by reason of the fact that, when he so declared his intention, he was entitled, by reason of length of residence, to be naturalized, under Section 2167 of the United States Revised Statutes, for the reason that section merely dispensed with the two-year delay between the declaration of intention and the actual admission to citizenship which is prescribed by Section 2165 of the Revised Statutes. This

case does not determine or even touch upon the constitutionality of Section 2169. It is not in point.

Appellee next referred to the case of *Thomas v. Woods,* 173 Fed. 585. This case does not deal with the subject of naturalization and Section 2169 is not even mentioned, and, therefore, it is not in point. It involves the subject of bankruptcy and holds that the requirement that bankruptcy laws shall be uniform throughout the United States means no more than that it shall be geographically uniform rather than intrinsically uniform. Appellant agrees with this holding and the rule expressed therein has been reiterated and sustained by the United States Supreme Court on several occasions. However, the bankruptcy clause is worded differently from the naturalization clause of Article 1, Section 8, Clause 4, of the Constitution, and this decision has no bearing on the constitutional question as to whether or not the naturalization clause demands intrinsic and personal uniformity. This question has never been decided in any adjudicated Federal decision.

Appellee next calls attention to and quotes from the case of *Tutun v. United States,* 270 U. S. 568, 70 L. Ed. 738, as authority. The only point raised and/or determined in this decision was whether an order of the United States District Court granting or denying a petition for naturalization is a final decision within the meaning of Section 128 of the Judicial Code, and, therefore, an appealable order. The Supreme Court decided and held that it was a final order within the meaning of the Judicial Code and appealable as such. Nothing

else was decided. The constitutionality of Section 2169 most assuredly was not raised, decided or even mentioned in the *Tatun* case.

The case of *Miller v. Wilson,* 236 U. S. 373, is cited by the appellee in the Court of Appeals as authority, and a quotation purportedly taken from the opinion of the Supreme Court in this case appears commencing at the top of page 15 of appellee's brief. Appellee, in compiling its brief for the Court of Appeals, inadvertently misplaced a quotation which was, in reality, taken from the immediately succeeding case of *In re Kumagai,* 163 Fed. 922, which is cited directly following the quotation as it presently appears in appellee's brief. The *Miller v. Wilson* case is very clearly not in point with the instant appeal. The Supreme Court there sustained the constitutional validity of a statute of the State of California, and held that while the limitation of hours of labor of women may be pushed to an indefensible extreme, the limit of reasonable exertion of the protective authority of the state was not overstepped and liberty of contract unduly abridged by a statute prescribing eight hours a day or a maximum of forty-eight hours a week. This case involved no question concerning naturalization or the constitutionality of Section 2169 of the Revised Statutes.

In re Kumagai, 163 Fed. 922, decided by District Judge Hanford, sitting in the United States District Court for the Western District of Washington, on September 3, 1908, is the last case cited by the appellee. All that was raised or determined in the

Kumagai case was that Section 2166 of the United States Revised Statutes authorizing the naturalization of aliens honorably discharged from the military service of the United States was limited by Section 2169, and, therefore, did not apply to alien Japanese honorably discharged from the military service of the United States, because they were not "white" persons. The constitutionality of Section 2169 was not attacked or questioned on any ground in this case. It is not in point.

The utterly unreasonable, arbitrary and capricious discrimination against natives of India and certain other races of Asiatic origin, contained in Section 2169 of the United States Revised Statutes, and its gross inequality, are so manifest upon the face of this statute, that we are unable to comprehend how this grossly unlawful discrimination and classification and inequality of operation, and the consequent violation of the express provisions of the due process of law clause of the Fifth Amendment to the Constitution of the United States, can fail to be apparent to the mind of every intelligent person, be he lawyer or layman. In other words, the unlawful discrimination and classification seemingly is so obvious to any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds which are so constituted that the invalidity of this statute respecting its unlawful favoring aliens of African nativity and of African descent is not apparent upon inspection, and comparison with the provisions of the Constitution and the decisions of the United States Supreme Court inter-

preting the concept and content of due process of law, discussion or argument would be useless.

In conclusion we desire to call to the attention of this Honorable Court that such decisions relating to naturalization as *United States v. Macintosh,* 283 U. S. 605, 615; *United States v. Ginsberg,* 243 U. S. 472, 474; *Maney v. United States,* 278 U. S. 17, 22; *United States v. Schwimmer,* 279 U. S. 644, 649; *Tatun v. United States,* 270 U. S. 568, 578; *Terrace v. Thompson,* 263 U. S. 197, and *Warkentin v. Schlotfeldt* (C. C. A.-7th), 93 Fed. (2d) 42, are not in point with the instant petition for the very obvious reason that in none of these cases was the point made, raised or discussed that Section 2169 of the United States Revised Statutes was unconstitutional for any reason. Neither was it raised in these cases that Section 2169 was manifestly arbitrary and capricious for the reason that it permits natives of Africa and aliens of African descent to become naturalized citizens of the United States, while withholding naturalization from intermediate and better qualified races.

It is respectfully submitted that the writ of certiorari should be granted and the judgment of the United States Circuit Court of Appeals should be reversed.

Dated: May 14, 1942.

Respectfully submitted

ERNEST B. D. SPAGNOLI,
Attorney for Appellant.

WALTER F. LYNCH,
Of Counsel for Petitioner.

No. 180.

In the Supreme Court of the United States

October Term, 1938

[redacted]

v.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 130

KHARAITI RAM SAMRAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the Circuit Court of Appeals affirming the order of the District Court denying petitioner's petition for naturalization (R. 9) was entered on February 13, 1942 (R. 29). No petition for rehearing was filed (Pet. 7). Thus the three months' period allowed by section 8 (a) of the Act of February 13, 1925, 43 Stat. 940, as amended (U. S. C., title 28, sec. 350), for filing a petition for writ of certiorari expired on May 13, 1942. The Clerk has advised that an application for an extension of time was made to a Justice of this Court on May 14, 1942, and was denied. See *Cresswell* ex rel. *Di Pierro* v. *Tillinghast,* 286

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U. S. 560. Petitioner nevertheless filed his petition for the writ on June 8, 1942. The petition is out of time and should be dismissed for want of jurisdiction.[1]

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JULY 1942.

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[1] *Hartford Accident Co.* v. *Bunn*, 285 U. S. 169, 177–178; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 417–418; *Rust Land Co.* v. *Jackson*, 250 U. S. 71, 76; cf. *United States* ex rel. *Coy* v. *United States*, decided May 25, 1942, No. 973, October Term, 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1942